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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-2002

H. J. JUSTIN & SONS, INC.,
doing business as JUSTIN BOOT
COMPANY,

Petitioner,

v.

GEORGE DEUKMEJIAN, Governor
of the State of California,
et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT GOVERNOR OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

On August 21, 1981, the United States District Court for the Eastern District of California issued its Memorandum and Order in the case of H. J. Justin &

Sons, Inc., dba Justin Boot Company v. Brown, Governor, State of California, No. CIV.S 80-941 RAR, granting respondent Governor of California's motion for summary judgment reported at 519 F.Supp. 1383 (E.D., Cal. 1981). (See Appendix, p. A1 to petitioner's Petition for Writ of Certiorari.)

On March 11, 1983, the United States Court of Appeals for the Ninth Circuit, Case No. 81-4492 reported at 702 F.2d 758, reversed in part and affirmed in part the opinion and judgment of the U.S. District Court for the Eastern District of California. (See Appendix, page A17 to petitioner's Petition for Writ of Certiorari.)

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. section 1254(1).

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QUESTIONS PRESENTED

1. Whether California Penal Code sections 653o and 653r are preempted by the Endangered Species Act of 1973. 16 U.S.C §§ 1531-1543.

2. Whether California Penal Code sections 653o and 653r are preempted by the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[1]

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1. Before the trial court, petitioner invoked no treaty other than the Convention. On appeal, however, to the 9th Circuit and in the Petition for Writ of Certiorari, petitioner also invokes The General Agreement on Tariffs and Trade. (Petition for Writ of Certiorari, p. 2.)

"Errors not raised below will ordinarily not be considered on appeal. [Citations.]" Michael-Regan Co., Inc. v. Lindell (9th Cir. 1975) 527 F.2d 653, 659. The latter treaty is, nonetheless, fully addressed in this brief, should the Court wish to reach that new issue.

STATUTES INVOLVED

The statutes involved are California Penal Code sections 653o and 653r; the federal Endangered Species Act of 1973, 16 U.S.C. sections 1531-1543 specifically section 1535(f); the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.C. section 1087; TIAS 8249; and the General Agreement on Tariffs and Trade, 61 Stats. 73 (1947).

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The complaint in this case was filed on December 2, 1980. It sought a declaration of invalidity and an injunction against the enforcement of California Penal Code sections 653o and 653r. Section 653o provides in relevant part:

> "It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead

> body, or any part or product thereof, of any . . . python . . . kangaroo . . . or elephant."

Section 563r states that the violation of section 653o constitutes a misdemeanor.

Petitioner alleged that it wishes to sell, in California, boots made from the hides of the above species, but that both it and its customers are deterred by the above statutes. It alleged that the California statutes are unconstitutional, in that they have been preempted by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249, and by the Endangered Species Act of 1973, 16 U.S.C. sections 1531-1543. Petitioner additionally alleged that the state statutes violate the Commerce Clause.

The parties filed cross-motions for summary judgment. On August 21, 1981, the District Court issued a Memorandum and Order

denying petitioner's motion for summary judgment, and granting respondents' motion.[2/] Judgment was entered on August 24, 1981. On September 22, 1981, petitioner filed a notice of appeal (CR 11). On March 11, 1983 the United States Court of Appeals for the Ninth Circuit reversed in part and affirmed in part the opinion and judgment of the U.S. District Court. (See Petition Appendix, p. A17; reported at 702 F.2d 758.)

ARGUMENT

I

CALIFORNIA PENAL CODE SECTIONS 653o and 653r ARE NOT PREEMPTED BY THE ENDANGERED SPECIES ACT OF 1973.

A. Introduction.

Petitioner argues that California Penal Code sections 653o and 653r are expressly preempted by the Endangered

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2. The District Court's Memorandum and Order is published at 519 F.Supp. 1383.

Species Act of 1973 (16 U.S.C. §§ 1531-1543). (Petitioner's Petition for Writ of Certiorari, hereafter "Petition", pp. 7, 10.)

Both sides in this case rely upon conflicting interpretations of 16 U.S.C. § 1535(f), which provides as follows:

> "(f) Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined."

B. The Provisions of Section 1535(f).

"Logic and precedent dictate that '"[t]he starting point in every case involving construction of a statute is the language itself."' [Citations.]" Greyhound Corp. v. Mt. Hood Stages, Inc. (1978) 437 U.S. 322, 330, 98 S.Ct. 2370, 57 L.Ed.2d 239. Accordingly, we will first review with some care the language of section 1535(f).

The statute sets forth two instances in which a state law is void:

First, a state law may not:

"(1) permit what is prohibited by this chapter. . . ."

Thus, federal law provides the minimum national standards of protection, and a state may not in any case be more lenient than federal law.

If a state may not be more lenient than the minimum national standards, may it

be more strict? The second proviso answers this question. A state law may not:

> "(2) prohibit what is authorized pursuant to an exemption or permit. . . ."

The sentence goes on to state how an exemption or permit may be enacted, i.e., by being "provided for in this chapter or in any regulation which implements this chapter."

There is an exception to the proviso that a state law may not "prohibit what is authorized pursuant to an exemption or permit." It pertains to taking of resident species.

With respect to resident species:

> "Any state law or regulation respecting the taking of an endangered gered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter. . . ." (Emphasis added.)

The meaning of the language in section 1535(f) is straightforward and if read with care is not subject to serious doubt or

need for arcane interpretation: States may never be more permissive than the minimum national standards; nor may they contravene the terms of an exemption or permit; except that with respect to resident species a state may be more restrictive than an exemption or permit.

C. The Legislative History of Section 1535(f) Conclusively Demonstrates Congress' Intention to Prevent the ESA From Preempting State Laws Prohibiting Importation of Species Not Covered by ESA.

The District Court considered the legislative history of section 1535(f) at length (519 F.Supp. at 1388-1389) and concluded that explicit portions of that history bearing on this matter "are unequivocal and are not qualified by any other portion of the legislative history." Id. at 1389.

The legislative history, is unusually explicit, and utterly contradicts petitioner's interpretation of the statute.

Indeed, the precise origin of the statutory language is revealed as being a letter from the Department of the Interior, which also contained an explanation that the language was intended to prevent preemption, and was written in response to the desire of Congress to prevent preemption of state laws, including the very statute at bar.

With this background, we will trace the history of the Act as it pertains to preemption.

It should be noted, first, that predating the Endangered Species Act of 1973 is another statute, 16 U.S.C. section 667e, which remains valid and in force:

> "All dead bodies, or parts thereof, of any foreign game animals, or game or song birds the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or

> Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Congress, therefore, has manifested no hostility to State regulation of foreign animal parts being brought into the State for sale or use therein. Petitioners Petition contains no discussion of this statute.

Also predating the Endangered Species Act of 1973 is the Endangered Species Act of 1969 (Pub. L. 91-135; 83 Stats. 275, § 7). Arguments of preemption based on this Act were directed against New York's Mason Act (an act quite similar to the California statutes at bar) in Palladio v. Diamond (2d Cir. 1971) 440 F.2d 1319, cert. den. 404 U.S. 983, adopting and affirming 321 F.Supp. 630; and A.E. Nettleton v. Diamond (1970) 27 N.Y.2d

182, 315 N.Y.S.2d 625, 264 N.E.2d 110, appeal dismissed sub nom Reptile Products Assn. v. Diamond, 401 U.S. 969, 91 S.Ct. 1201, 28 L.Ed. 2d 319.

In Palladio, the plaintiff contended that the absence of a species of crocodiles on the Endangered Species List precluded New York from forbidding the sale of products made from this species. The Court, addressing the issue of implied preemption (the 1969 Act had no counterpart to section 6 of the 1973 Act (16 U.S.C. § 1535(f)), quoted supra), found no incompatibility between the two laws and further stated at p. 635:

> "We likewise find no merit in plaintiff's contention that the Mason Law interferes with Congress' power to regulate commerce and to make treaties, with federal control over foreign affairs, and with the supremacy clause of the Constitution. On the contrary the Endangered Species Act invites state action."

The Nettleton case, which involved the same issues, was decided by the New York Court of Appeals. At page 630, the court described the applicable preemption rule derived from Florida Lime and Avocado Growers v. Paul, (1963) 373 U.S. 132 at p. 141 as follows:

> "[P]reemption could only occur if there was 'such actual conflict between the two schemes of regulation that both cannot stand in the same area (or) evidence of a congressional design to preempt the field' (citation omitted). Turning to the first test (State power to legislate), there is no real conflict between the Federal statute and the Mason Law. While it is true that our State statute includes species which are not on the Federal list . . ., there has been no showing that compliance with both the Federal and State law is an impossibility (see Bibb v. Navajo Frgt. Lines, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003; Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317; 27 S.Ct. 367, 51 L.Ed. 523). Nor has it been demonstrated that the Mason Law could not be enforced without impairing the effectiveness of the Federal Act. The Industry has not shown that wildlife conservation is

> a matter exclusively within the sphere of Federal competence . . . Thus, it would seem that the pre-emption question narrows down to whether Congress by the 1969 Act has evidenced its design to exclude State action. We think it has not. Federal displacement of the 'historic police powers of the States' should not be decreed 'unless that was the clear and manifest purpose of Congress' (Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 91 L.Ed. 1447). 'In other words, we are not to conclude that Congress legislated the ouster [of the Mason Law by the Federal Act] in the absence of an unambiguous congressional mandate to that effect' [citation omitted]. We find no such mandate."

This case background was of importance when the Endangered Species Act of 1973 was before Congress. Four bills were considered:

H.R. 37 and S. 1983 were Congressionally initiated measures, while H.R. 4758 and S. 1592 were sponsored by the Department of Interior. Section 4(e) of the later bills, which addressed the issue of preemption of state laws, was generally less

amenable to more restrictive state legislation than was the analogous section 6(f) of the former measures. Congress ultimately enacted the substance of H.R. 37 as the Endangered Species Act of 1973.

House of Representatives Report 93-412, 93d Congress, 1st Session (July 27, 1973) discussed the language which was to become 16 U.S.C. section 1535(f). At page 7 of the Report, it is stated:

> "The question of preemption of state laws was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exportation or interstate commerce; in any such case the State could not override the Federal action. In every other

respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired." (Emphasis supplied.)

Summarizing section 6(f) of the Act, the Report said at page 14:

"(f) This paragraph indicates that the states are to be free to develop regulatory mechanisms which are more stringent or more restrictive than those of the Federal government. Existing state endangered species programs would, for example, be in a position to include species which were not on the Federal list. The only exception to this is contained in the language which expressly prohibits the state from permitting specific actions forbidden by Federal agencies. In all other regards, the state law is not preempted, but is merely subject to the Federal "floor" of regulations under the Act. Thus, laws already passed in States such as New York, California and Hawaii, which list additional species or prohibit such activities as sales within their jurisdiction would remain unaffected." (Emphasis supplied.)

The question of State preemption was indeed of great interest during the hearings. In Hearings Before the House Com.

on Merchant Marine and Fisheries On H.R. 37, 93d Cong., 1st Sess. at pp. 351 et seq., an extensive presentation was made by an Assistant Attorney General of the State of New York in opposition to H.R. 4758 on the ground that the former bill would reverse the result of the cases, cited above, sustaining New York's Mason Law under the 1969 Act. Id. at pp. 351-362. A Statement from the Attorney General of New York, Louis Lefkowitz, to the same effect, was presented. Id. at p. 362.

Likewise, the Attorney General of California presented a statement on behalf of California Penal Code section 653o, the very statute at bar. It was noted that 653o "is similar to New York State's Mason Law in that California protects certain species that the Secretary of the Interior has not yet found to be endangered and therefore are not

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protected by federal law." Id. at pp. 374-375.

The letter continued:

> "One example is illustrative of the value of allowing states such as New York and California to contribute to the effort to protect species which are being subjected to commercial exploitation and are threatened with extinction. In 1971 the California legislature gave protection to several additional species threatened with extinction including the kangaroo. At that time, vast numbers of kangaroo were being killed for pet food and hides. Effective April 1, 1973, the Australian government completely banned the export of kangaroo hides and meat. The Secretary of the Interior is presently considering the proposed addition of several species of kangaroo to the federal endangered species list. Hopefully, this action has not come too late.
>
> "We join with the Attorney General of New York in strongly recommending that your subcommittee amend H.R. 4758 to allow states to have more restrictive laws to protect endangered species. We are also of the opinion that your own bill, H.R. 37, presents the best approach in this regard."

Representative Dingell sent a copy of these materials to Mr. Reed, Assistant

Secretary of the Interior, noting that "the Interior Department's position is that the language of H.R. 4758 does not in any significant respect bar the application of the Mason Act." Id. at p. 386.

Mr. Reed wrote back and, still referring to the more restrictive language of H.R. 4758, said:

> "It was not our intention in drafting section 4(e) of H.R. 4758 to: (a) void State laws, such as New York's Mason Act, which apply to the sale of species not appearing on the federal endangered species lists; (b) void such State laws, even if they effectively prohibit sales of species which would appear on the Federal list, whether or not the transactions occur or the articles move in interstate or foreign commerce; (c) to void State laws forbidding importation or exportation of any fish or wildlife for bona fide State purposes, such as the protection of human health or wildlife ecology; (d) void all State laws which regulate interstate or foreign commerce in endangered or non-endangered species by 'preempting the field' of commercial restraints upon the trade in or movement of such fish and wildlife in interstate or

foreign commerce." (Id. at p. 387, emphasis in original.)

The only limitation was:

> ". . . that the State should not be permitted to prohibit acts which are expressly allowed by a Federal permit or exemption, or to permit what is prohibited by Federal law." (Id., emphasis in original.)

Continuing the distinction between express permission, and mere lack of restriction, Mr. Reed said:

> "Whereas Congressional silence as to certain species or in certain regulatory areas need not, in our view, be construed as a Fedeal permission to sell or trade in species not listed pursuant to the bill (Robertson v. People of the State of California, 328 U.S. 440 [1946]), subsection 4(e) of the bill does raise this implication.
>
> "We, therefore, offer for your consideration the following substitute language to more clearly identify our intent with respect to both State 'taking' laws, as well as State laws which regulate commerce: . . ."

Mr. Reed thereafter offered new language virtually identical to section 1535(f).

He concluded by noting that under this language the States could, "subject to very narrow limitations, . . . regulate not only federally listed species, in company with the Federal Government, but to regulate species not so listed, completely free from the reach of this Act." (Id. at p. 388, emphasis supplied.)

As was quoted above from the Commission Report, the Administration bill was rewritten to reflect Mr. Reed's suggested wording and to permit state statutes such as the Mason Act and California Penal Code section 653o to remain unpreempted.

A clearer statement of Congressional intent could not be found. Moreover, the Committee's interpretation of the proposed Act was followed unanimously by both houses of Congress. As Representative Grover, one of the principal proponents of the measure, stated:

> "[W]e have adequately protected legitimate state interests, powers, and authorities in H.R. 37 by providing for concurrent Federal/state jurisdiction and permitting the States to enact their own more restrictive laws; if so desired. Such fine acts as New York's Mason Act. . . will not be superseded by this bill to the extent that such State laws are more restrictive. . . ." (119 Cong. Rec. 30165.)

The Senate echoed the conclusions of the House. Senator Tunney of California, a sponsor of S. 1983, and Senator Stephens, a major supporter of the bill, made clear that the preemptive provisions of the federal Act was aimed not at more restrictive state legislation, but at excessively permissive state laws which failed to provide adequate protection to regulated species of wildlife. Id. at pp. 25670-25673. Indeed, Senator Stephens specifically approved the existing endangered species legislation of the States of Alaska, Illinois and Texas, all of which were similar to Penal Code sections 653o and 653r, as

models of effective state legislation in the field.

In summary, California Penal Code sections 653o and 653r, and the similar endangered species legislation of other states, received the utmost deference and approval from the Congress that enacted the Endangered Species Act of 1973.

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II

THE CALIFORNIA STATUTES ARE NOT PREEMPTED BY ANY TREATY.

A. Introduction.

Petitioner devotes a significant portion of its Petition to explicating treaties which it claims are inconsistent with state regulation of trade in the species at bar. (Petition, 5, 7, 8, 15-17.)

In this portion of respondents' brief, we will first demonstrate that petitioner is sorely misreading the treaties it invokes. Second, we will present ample authority for the proposition that even if the treaties did, in fact, conflict with the Act, it is the treaties, rather than the Act, which would yield.

We note, at the outset, that the amicus brief of the United States filed in the 9th Circuit Court proceedings supports the position of respondents that the state

statutes are not preempted by treaty. (Brief of the United States as Amicus Curiae, pp. 9-10; see Appendix hereto.) The District Court also so concluded. (519 F. Supp. at 1390.)

B. The Convention on International Trade in Endangered Species of Wild Fauna and Flora Does Not Preempt The State Statutes.

1. The Convention Is Not Self-Executing, But Was Rather Implemented By the Endangered Species Act, Which In Turn Expressly Sanctions the State Statutes.

The District Court properly found it unnecessary to address the terms of the Convention. (519 F.Supp. at 1390.) As the Court concluded:

> "The Convention is not self-executing since implementing legislation must be enacted by Congres before the Convention has the force of law. Moreover, once enacted, it is the implementing legislation, and not the treaty itself, that is

the law of the land, Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980):

> "Moreover, 'if a treaty is not self-executing it is not the treaty bu the implementing legislation that is effectively "law of the land."'
>
> "The implementing legislation of the Convention is the Endangered Species Act of 1973, see, e.g., 16 U.S.C. §§ 1531(4)(F), 1532(4), 1537a, and 1538(c). In light of the Court's conclusion that the Endangered Species Act of 1973 did not preempt California Penal Code §§ 653o and 653r, there is no need to discuss the terms of the Convention." (Id.)

The United States agrees with this reasoning as well. (Brief of the United States as Amicus Curiae, p. 9, see appendix.)

While petitioner likewise notes that the Convention and the Endangered Species Act were contemporaneously adopted, no attention whatever is paid in petitioner's petition to the trial court's (adopted by the 9th Circuit court) reasoning on this issue.

As petitioner has provided nothing to refute, we will simply ask the Court to affirm the circuit court's resolution on this issue on the ground articulated in its Memorandum by denying the petition for a writ of certiorari.

2. The Terms of the Convention Refute Petitioner's Contention.

Far from forbidding the signatories from imposing conditions on trade which are more protective than is provided by the Convention, Article XIV of the Convention expressly provides as follows:

> "The provisions of the present Convention shall in no way affect the right of the parties to adopt:
>
> "(a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
>
> "(b) domestic measures restricting or prohibiting trade, taking possession, or transport of

species not included in Appendices I, II, or III. . . ."

Petitioner cannot explain how a "preemption" argument can be based on the Convention in light of this anti-preemption provision. The Convention is quite clearly addressed to restricting trade in certain animals, and expressly declines to discourage stricter domestic regulation or prohibition of trade in animals whether or not such trade is regulated under the Convention. Petitioner's attempt to transmute the Convention into a treaty designed to promote trade in animals against interfering domestic regulation is an attempt to stand the Convention on its head.

Nor can it be argued that California is not a party to the Convention, and that under the Convention only a "party" may adopt stricter domestic measures.

The short answer to this is that the United States is a party to the

Convention, and that its "stricter domestic measure" is 16 U.S.C. § 1535(f).

The idea that the Convention forbade a signatory which is organized in a federal system from providing for comity with its states is not to be found in the language or purport of that treaty. Article XIV nowhere presumed to interfere with the governmental organization of the United States by requiring that the "stricter domestic measures" be measures that preempt state statutes and operate identically throughout the territory of the signatory.

As was said in United States v. Pink (1942) 315 U.S. 203, 230:

> "[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. Guaranty Trust Co. v. United States, supra [304 U.S. p. 143, 82 L.Ed. 1234, 58 S.Ct. 785] and cases cited. For example in Todok v. Union State

> Bank, 281 U.S. 449 [4 L.Ed. 956, 50 S.Ct. 363] this Court took pains in its construction of a treaty, relating to the power of an alien to dispose of property in this county, not to invalidate the provisions of state law governing such dispositions. Frequently the obligation of a treaty will be dependent on state law. Prevost v. Greneaux, 19 How U.S. 1 [15 L.Ed. 572]."

The United States makes appropriately short shrift of this point by quoting Article XIV and noting that section 1535(f) "of course, implements CITES in the United States". (Brief of the United States as Amicus Curiae, p. 9.) Little more need be said.

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C. The General Agreement on Tariffs and Trade Does Not Preempt the State Statutes.

Petitioner's invocation of the 1947 treaty entitled the General Agreement of Tariffs and Trade is most peculiar.[3/]

As petitioner explains the treaty:

> "The General Agreement on Tariffs and Trade ("GATT") accords most favored nation status to such countries as Australia, New Zealand, Burma and Ceylon. As amended, it represents an international policy of non-discriminatory trade among the highly developed signatory nations (Parts I-III) as well as a policy of free trade on a basis favorable to the less developed nations (Part IV). The GATT expressly recognizes the right of a signatory nation to prohibit trade in a particular article of commerce 'to protect human, animal, or plant life or health,' Article XX, GATT, Part II, but requires the contracting parties to assure compliance by their political subdivisions at the local level. Article XXIV(12),

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3. As was noted above (at note 1), this treaty was injected into the case for the first time in Appellant's Opening Brief. The District Court therefore did not have the opportunity to rule on this issue.

GATT, Part III. Leather is a category of like articles of commerce for purposes of the GATT and the Tariff Act of 1930, 19 U.S.C. §1202, Part 5." (Petition, pp. 15, 16.)

Is petitioner contending that 16 U.S.C. section 1535(f) is not designed to protect animal life, as allowed under the General Agreement? One cannot tell.

Petitioner's obscure contention that section 1535(f) somehow interferes with some nation's "most favored nation" status regulating tariffs is not easily to be understood at all.

Suffice it to say, as shall be shown in the next section of this brief, if 16 U.S.C. section 1535(f) provides for the vitality of the California statutes, the Court need not puzzle through petitioner's claim respecting the General Agreement.

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D. As Section 1535(f) Expressly Sanctions the State Statutes, Petitioner's Attempt To Construe Treaties As Contradicting the Statutes Is Pointless.

Petitioner apparently believes that a treaty conflicting with 16 U.S.C. section 1535(f) would invalidate that statute and in turn invalidate the California statutes promulgated thereunder. (AOB 9-10, 18-19, 23-24.) Petitioner is in error.

While under the Supremacy Clause of the United States Constitution treaties have supremacy over state laws in conflict therewith, they have only parity with congressional enactments. It is well established that subsequent congressional acts govern over an earlier treaty. (Whitney v. Robertson (1888) 124 U.S. 190; the Head Money Cases (1884) 112 U.S. 580; U.S. v. Rumsa (1954) 212 F.2d 927, cert. den. 340 U.S. 838; U.S. v. 85,237 Acres of Land,

More or Less, in Zapata County, Texas (1957) 157 F.Supp. 150, aff'd Guerrero-Zapata Bridge Co. v. U.S., 252 F.2d 116; Calnetics Corp. v. Volkswagen of America, Inc. (D.C. Cal. 1973) 348 F.Supp. 623; U.S. v. Consolidated Wounded Knee Cases (D.C. Neb. 1975) 389 F.Supp. 235; U.S. v. McIntire (D.C. N.J. 1973) 365 F.Supp. 618; Tag v. Rogers (C.A.D.C. 1959) 267 F.2d 664, cert. den. 362 U.S. 901; Ex Parte Green (C.C.A.2d 1942) 123 F.2d 862, cert. den. 316 U.S. 668; John E. Bill Co. v. U.S. (Cust. & Pat. App. 1939) 104 F.2d 67; Watson v. Hoey (D.C. N.Y. 1945) 59 F.Supp. 197; Savelis v. Vlachos (D.C. Va. 1956) 137 F.Supp. 389, aff'd 248 F.2d 729.) Since, under these authorities, Congress may by subsequent legislation modify an earlier treaty, assuming arguendo that the Endangered Species Act of 1973 is inconsistent with the Convention, or the General Agreement, the Act would control.

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Additionally, we doubt that petitioner is a proper party to raise the issue of a fanciful "conflict" between the Convention and the Act. It would appear a more appropriate issue to be raised between the signatories to the Convention. (Skiriotes v. State of Florida (1941) 313 U.S. 599; Hjelle v. Brooks (D.C. Alaska 1974) 337 F.Supp. 430.)

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III

THE CALIFORNIA STATUTES ARE NOT PREEMPTED BY ANY PERMIT.

A. Introduction.

At this point, we have established that neither the Convention, nor the General Agreement, nor the Act automatically preempt the California statutes. Petitioner does not contend that the federal government has adopted an exemption for these species.

The case comes down to whether the California statutes

> "prohibit what is authorized pursuant to . . . [a] permit provided for in this chapter or in any regulation which implements this chapter." (16 U.S.C. § 1535(f).)

The proper analysis of this issue requires that the regulatory status of the species at bar be examined separately.

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1. Indonesian Pythons.

As petitioner explains:

> "The Indonesian python is also listed as a threatened species under Appendix II of the Convention but is not enumerated as an endangered or threatened species under §1533 of the Act. (Petition, p. 5.)

Accordingly, an export permit issued by the country of origin is required, but no permit issued by the Secretary of Interior under the Endangered Species Act is provided for.

Petitioner thus is not operating under any permit issued by the federal government with respect to pythons, and does not invoke the permit exemption set forth in section 1535(f). As the United States indicated in its amicus brief:

> "Because the federal government has taken no specific action under the ESA to regulate the importation or sale of [this] species, the California law relating to the sale of parts of [this] species is not preempted." (Brief of the United States as Amicus Curiae, pp. 6-7.) (See Appendix.)

The states' power to regulate species not regulated by the federal government was not left in a state of ambiguity either in the language of the state or in the legislative history:

> "Existing state endangered species programs would, for example be in a position to include species which were not on the Federal list . . . Thus laws already passed in States such as . . . California . . . which list additional species or prohibit such activities as sales within their jurisdiction, would remain unaffected." (H.R. Rep. No. 93-412, 93rd Cong., 1st Sess., p. 14 (1973); see id. at p. 7.)

2. Robustus Kangaroo.

As petitioner explains:

> "The Australian kangaroo (Macropus robustus) is not enumerated in any appendix to the Convention and is not listed as either endangered or threatened under the Act. Therefore, no permit is required in order to import the skins of the Austrialian kangaroo lawfully into the United States." (Petition, p. 5.)

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Accordingly, as petitioner indicated to the District Court, it "has no permit or exemption from the Secretary of Interior to import or sell in interstate commerce the . . . Wallaby kangaroo." (519 F. Supp. at 1390.)

The identical analysis applicable to the Indonesian python thus applies to the kangaroos at bar.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

No. 81-4492

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H.J. JUSTIN & SONS, INC., ETC.,

Plaintiff-Appellant

v.

EDMUND G. BROWN, JR., ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the respective areas of operation of state and federal statutes designed to protect endangered species, and the effect to be given a federal permit which authorizes, pursuant to a federal statute, an activity prohibited by state law. The United

States believes that its views on these questions may be of assistance to the Court in its consideration of this case.

OPINION BELOW

The opinion of the district court (Honorable Raul A. Ramirez) was issued on August 21, 1981.

QUESTION PRESENTED

Whether a California statute prohibiting the sale of elephant parts is applicable to a company which has been issued, pursuant to the federal Endangered Species Act of 1973, 16 U.S.C. 1531 et seq., a permit authorizing it to sell African elephant parts or products in interstate commerce.

STATEMENT

H.J. Justin & Sons, Inc., a Texas boot manufacturer, wishes to sell boots made from the hides of the Indonesian python, the Wallaby Kangaroo (Macropus robustus)

and the African elephant in the State of California. Sections 653o and 653r of the California Penal Code prohibit the importation into California for commercial reasons, the possession with intent to sell, or the sale within the State, of the parts or products of 24 different animals, including the "python, * * * kangaroo, * * * or elephant." The statutes make no distinction between different species of the listed animals, but apply to all types of pythons, kangaroos and elephants.[1/] Justin has a permit from the federal government authorizing it to import into this country and sell African elephant parts. It brought this action against the Governor of the State of California and other state officials to secure a declaratory judgment that the pertinent sections of the California Penal

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1/ Biologists recognize over 50 different species of "kangaroo," many species of "python" and at least two species of elephants.

Code are inconsistent with certain federal statutes and thus are, to that extent, invalid. Justin also sought to enjoin the defendants from enforcing those statutes.

On cross-motions for summary judgment, the district court held that the California statutes were not preempted by international treaty (the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 27 U.S.T. 1087, T.I.A.S. 8349), or by federal law (the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 et seq.). It also rejected Justin's claim that the California statutes constituted an impermissible burden on interstate commerce, and concluded that Justin was prohibited in California from selling python, kangraoo and African elephant parts or products. The district court ruled that the federal permit issued by the Secretary of the Interior authorized Justin to sell African elephant parts

or products only if not prohibited by state law. Justin has appealed.

ARGUMENT

SPECIFIC FEDERAL AUTHORIZATION PURSUANT TO THE ENDANGERED SPECIES ACT TO IMPORT OR SELL IN INTERSTATE COMMERCE THE PARTS OF A SPECIFIC ANIMAL OVERRIDES INCONSISTENT STATE LAW

While we agree with the district court's conclusion that California statutes designed to regulate fish and wildlife are not automatically preempted by the ESA or CITES. Authorization given pursuant to ESA to import into and sell in this country parts or products of African elephants, however, necessarily overrides any provisions of California law which may purport to prohibit such importation or sale.

Congress enacted the Endangered Species Act of 1973 in part to carry out its obligations under CITES and other international agreements designed to protect fauna and flora facing extinction. The ESA created two categories of species to which it extended

protection: endangered species, which includes any species in danger of extinction throughout all or a significant portion of its range, and threatened species, which includes any species likely to become an endangered species in the foreseeable future. 16 U.S.C. 1532(6) and (20).

Unless specifically authorized or exempted, the ESA prohibits the sale, import, or export of endangered species. 16 U.S.C. 1538(a). With respect to threatened species, the Secretary of the Interior may issue regulations necessary to provide for the conservation of those species, including the prohibition of any act which is prohibited for the protection of endangered species. 16 U.S.C. 1533(d). The Secretary has by regulation made all the restrictions applicable to endangered species also applicable to threatened species in the absence of contrary provisions. 50 C.F.R. 17.31 (1980). The ESA, however, also authorizes the Secretary

to issue permits allowing acts otherwise prohibited by ESA when necessary for scientific purposes or to enhance the propagation or survival of an affected species. 16 U.S.C. 1539(a).

The well understood rule with respect to the resolution of conflicts between state and federal statutes is that while the initial assumption is that "the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," yet when Congress has "unmistakenly * * * ordained" that its enactments are to regulate some part of commerce, inconsistent state laws regulating that aspect of commerce must fall. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). And where, as here, the congressional enactments do not exclude all state legislation in the same field, they "nevertheless override state laws with which they conflict." Ibid., 525-526.

It is clear that in the instant case, Congress has "unmistakenly ordained" that state laws pertaining to the commerce in endangered or threatened species are to be void to the extent that they purport to prohibit what the federal government expressly by permit authorizes to be done. Section 6(f) of the ESA, 16 U.S.C. 1535(5), provides that:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. [Emphasis supplied.]

Section 6(f) of the ESA is derived without change from Section 6(f) of H.R. 37 (93d Congress, 1st Session). The Report of the House Committee on Merchant Marine and Fisheries (House Report 93-412, pages 7-8; July 27, 1973) says with respect to this Section that:

> The question of preemption of state laws [regarding the taking of listed species] was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation or interstate commerce; in any such case the State could not override the Federal action. In every other respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired. [Emphasis supplied.]

Manifest from this is the congressional intent that federal actions either to ban or to permit interstate a foreign commerce in animal parts supersedes or *precludes inconsistent* state action.

Although the Secretary has listed the Indian python as an endangered species (50 C.F.R. 17.11 (1980)), five types of rat-kangaroo as endangered species (id.), six types of wallabys as endangered species (id.), and three other types of kangaroos (the red, the eastern gray, and the western gray) as threatened species (50 C.F.R. 17.11 and 17.40(a) (1980)), as amended by 46 Fed. Reg. 23929 (April 29, 1981), the Secretary has not listed either the Indonesian python or the Macropus robustus (Wallaby Kangaroo) as endangered or threatened species. Because the federal government has taken no specific action under ESA to regulate the importation or sale of these two species, the California law relating to the sale of parts of these species is not preempted.2/

2/ Justin argued that Section 6(f) only allowed the states to regulate indigenous species. The district court disagreed, reasoning that the first sentence of Section

(Footnote 2/ continued next page.)

The African elephant, however, is listed as a threatened species, 50 C.F.R. 17.11(h) (1980), and the Secretary has adopted special regulations which govern the importation of that animal and establish certain conditions for obtaining a permit from the Secretary to engage in trade in that species. 50 C.F.R. 17.40(e) (1980). Justin has obtained such a permit authorizing it to sell parts or products of African Elephants in interstate commerce. Therefore, as applied to Justin, the California

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2/ continued

6(f) governs preemption of state laws applying to non-indigenous species while the last two sentences of that Section govern preemption of state laws applying to indigenous species. We agree with this analysis for the reasons stated in the district court's opinion (slip op. at 4-7). Therefore, under the first sentence of Section 6(f), states can regulate non-indigenous as well as indigenous species to the extent that the regulation does not permit what is prohibited by the ESA or does not prohibit what is authorized pursuant to an exemption or permit under ESA.

statutes prohibiting the sale of elephants in California are preempted by that portion of Section 6(f) of ESA which voids state law to the extent that it prohibits what has been authorized by an ESA permit.

In concluding otherwise, the district court relied upon a condition in Justin's permit which provides that the validity of the permit was "conditioned upon strict observance of all applicable foreign, state, local of other federal law," and held that the permit's requirement that Justin comply with California law precluded it from selling parts or products of the African elephant.

The United States disagrees with the district court's interpretation of the language in the federal permit. In the government's view, the permit requires compliance with "applicable" state laws, i.e., those regulating the method by which

permitted activities are carried out (e.g., quarantine laws), but was not intended to defer to inconsistent state laws barring the very activity the permit authorizes. This interpretation conforms to the policy in Section 6(f) of the ESA of preemption of inconsistent state laws through federal authorization by permit or regulation (see page 7, supra), and is therefore reasonable. As the interpretation of the author of the permit, moreover, it is entitled to deference. See Udall v. Tallman, 380 U.S. 1, 16 (1965).

The preemptive effect of CITES presents a separate question. The United States is an original party to CITES, which it signed in 1973 and which entered into force in July 1975. The Convention regulates international trade in endangered species of wild fauna and flora and is implemented by the ESA. 16 U.S.C. 1537(a). Species

protected under the Convention are listed in one of three appendices: Appendix 1 includes all species threatened with extinction which are or may be affected by trade; Appendix II includes species which are not now necessarily threatened with extinction but may become so unless their trade is subject to strict regulation; and Appendix III includes all species which any party to the Convention currently regulates to prevent exploitation and which requires the cooperation of the other parties to control trade. CITES, Art. II. The trade of species listed within these appendices requires an export permit from the country of origin and, for Appendix I species, an import permit from the country of importation. CITES, Art. III-V. The African elephant and all pythons, including the Indonesian python, are listed in Appendix II of CITES and, therefore, require

an export permit from the country of origin. The Macropus robustus is not protected under CITES.

In addition to concluding that the ESA does not preempt Sections 653o and 653r of the California Penal Code, the district court also concluded that CITES does not preempt those statutes. This conclusion, in our opinion, is correct, not only for the reasons stated by the district court (slip op. at 12-13), but also because of Article XIV of CITES, which specifies that it does not affect the right of the "parties" to the Convention to adopt:

> (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
>
> (b) domestic measures restricting or prohibiting trade, taking, possession, or transport of species not included in Appendices I, II or III.

CITES, therefore, specifically allows stricter regulation by its member parties. Section 6(f) of the ESA, of course, implements CITES in the United States and permits more restrictive state regulation subject to the right of the United States by regulation, or (as here) by permit, to take some authorized action which may be inconsistent with -- and would thus pro tanto override -- the state law.

CONCLUSION

For the foregoing reasons, we urge that this Court affirm the holding of the district court that neither ESA nor CITES preempts California's statutes prohibiting the sale of the parts or products of the Indonesian python and the Macropus robustus, but that this Court reverse the district court's holding that the appellant herein may not, pursuant to its federally

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issued permit, sell African elephant parts or products within the State of California.

Respectfully submitted,

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